STATE OF MICHIGAN

COURT OF APPEALS

PROCARE HEALTH PLAN, INC., AUGUSTINE KOLE-JAMES, AUGUSTINE KOLE-JAMES PHARM D, MD, PC, d/b/a PROFESSIONAL MEDICAL CENTER,

Plaintiff-Counter-Defendant-Appellee/Cross-Appellant,

v

COMMUNITY HEALTH PLAN, INC., d/b/a ULTIMED HMO OF MICHIGAN, INC.,

Defendant-Cross-Plaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
March 30, 2004

No. 243227
Wayne Circuit Court
LC No. 99-930804-CK

PROCARE HEALTH PLAN,

Plaintiff-Appellee,

and

AUGUSTINE KOLE-JAMES, and AUGUSTINE KOLE-JAMES PHARM, D MD, PC, d/b/a PROFESSIONAL MEDICAL CENTER,

Plaintiff-Appellee/Counter-Defendant,

v

COMMUNITY HEALTH PLAN, INC. d/b/a ULTIMED HMO OF MICHIGAN, INC.,

Defendant-Appellant/Counter-Plaintiff.

No. 246370
Wayne Circuit Court
LC No. 99-930804-CK

Before: Kelly, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In these consolidated appeals, defendant Community Health Plan, Inc. d/b/a Ultimed HMO of Michigan, Inc. appeals as of right entry of a $479,716.07 judgment for plaintiffs following two successive trials in which the juries found that defendant breached the parties' agreement for payment of health care services provided by plaintiffs, Dr. Kole-James and his affiliated corporations, to members of defendant's health maintenance organization (HMO) (Docket No. 243227). Plaintiffs cross-appeal, claiming error in the trial court's grant of a new trial following the first trial. Defendant also appeals as of right a January 17, 2003 judgment awarding plaintiffs case evaluation sanctions of $159,905.35 (Docket No. 246370). We affirm.

I

In late 1997, plaintiffs entered into three agreements with defendant to provide health care services to State of Michigan Medicaid clients and Wayne County Urban Hospital Care Plus Program ("PlusCare") enrollees.[1] Under the agreements, plaintiffs assigned their Medicaid patients to defendant for a per-patient fee, i.e., a capitated payment.[2] In exchange, defendant assigned PlusCare patients to plaintiffs for the provision of medical services, paying defendant $15 per member per month.

This case centers on defendant's alleged breach of contract in failing to pay plaintiffs for amounts due under these agreements for the period January 1998 through February 2000. The parties' PlusCare agreement provided that the rate of payment was "based on 2,500 Plus Care members being assigned" to plaintiffs. The key dispute was whether the PlusCare payment provision obligated defendant to a minimum monthly payment for 2,500 members. Plaintiffs claimed that the parties agreed that plaintiffs would be assigned a minimum of 2,500 members per month and therefore defendant was obligated to pay plaintiffs a minimum of $37,500 per month. Because the actual monthly membership varied from a high of 2,125 to a low of 750 during the term of the parties' agreement, plaintiffs sought the difference between the monthly amounts paid and the $37,500 minimum. Defendant contended that no further payment was due because the payment provision only obligated defendant to assign 2,500 members over the term of the agreement, not on a monthly basis.

Plaintiffs also claimed that defendant breached the parties' Medicaid agreement by failing to pass on a proportional increase in Medicaid compensation received from the state. The parties' agreement stated, "In the event that the premium rates paid by the State of Michigan to

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[1] PlusCare is a Wayne County-sponsored program for indigent residents who are ineligible for Medicaid.

[2] According to the parties' agreement, "capitated payment" is "the per-member payment made monthly to the PCG [Primary Care Group (ProCare)] in consideration of services rendered to the member enrolled in the Plan [Ultimed HMO]."

Ultimed increase, the compensation rates set forth above shall increase by a proportional amount." Plaintiffs claimed that although the state increased the premium rates paid to defendant, defendant failed to increase plaintiffs' reimbursement accordingly. Plaintiffs further claimed that defendant failed to pay the pharmacy and inpatient bonuses plaintiffs earned.

Defendant asserted two counterclaims against plaintiffs. With regard to the PlusCare agreement, defendant claimed that monthly payments made to plaintiffs in February, March and April 1998, in the amount of $37,500 were overpayments because they were based on a PlusCare membership of 2,500, and the actual membership was less. Defendant sought the difference between the $37,500 and the amount due calculated on the lesser actual membership. The second counterclaim arose under the parties' Medicaid services contract. Defendant claimed that it had under-withheld from plaintiffs' capitated payments, amounts due for third-party provider reimbursements that defendant made on behalf of plaintiffs.

The parties' claims were tried twice, before different juries, with nearly the same result.[3] Both juries found that defendant breached the payment provision of the parties' PlusCare service contract. The first jury awarded damages of $392,105; the second jury awarded $395,475. Both juries found that defendant breached the parties' Medicaid service agreement by failing to pass on to plaintiffs a proportional increase in compensation for services after defendant received an increase in rates paid by the state awarding damages of $5,783.40 in each trial. Both juries found that defendant failed to prove its counterclaims.

II

Defendant claims that the trial court erred in denying defendant's motion for a directed verdict or judgment notwithstanding the verdict (JNOV) following the first trial with respect to plaintiffs' claim that defendant breached the payment provision of the parties' PlusCare agreement. We disagree.

A

This Court reviews de novo a trial court's decision on motions for a directed verdict or JNOV. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We review the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Sniecinski, supra; Wiley, supra.* A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law, *Sniecinski, supra.*

[3] After the first trial, the trial court granted defendant's motion for a new trial, finding that the verdict was against the great weight of the evidence.

B

The trial court committed no error in denying defendant's motion for directed verdict and for JNOV with regard to the payment provision of the PlusCare Agreement. The contract provision is ambiguous, and, given the evidence, reasonable minds could differ regarding whether the payment provision was based on a minimum monthly assignment of 2,500 members and therefore a monthly payment of $37,500.

A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic v Simplematic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). "If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Wiley, supra* at 491. The appellate court must recognize the unique opportunity of the jury and the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Id.*

The parties generally did not dispute the evidence at issue. Contrary to defendant's contention, this evidence was not conclusive regarding whether the parties intended that defendant was obligated to a monthly assignment of 2,500 members under the PlusCare Agreement payment provision. The PlusCare Agreement provided in relevant part:

> 1. Doctor shall assume financial responsibility for all primary care physician services and related office diagnostic laboratory and x-ray services rendered to Plus Care members assigned to Doctor, and provided within a medical practice office operated by Doctor. In exchange for the assumption of such financial responsibility by Doctor, and the provision of such primary care physician, diagnostic laboratory and x-ray services to Plus Care members assigned to Doctor, Ultimed shall compensate Doctor at a rate of $15 per member per month. Ultimed shall pay Doctor in accordance with the foregoing rate no later than the 7th day of each month per services provided during that month. *The above rate is based on 2,500 Plus Care members being assigned to Doctor.*

The terms of the agreement are ambiguous. A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). The agreement could be interpreted to mean that 2,500 members will be assigned over the term of the contract, as defendant contends, or interpreted to require a monthly current assignment of 2,500, as plaintiffs contend.[4]

[4] "Although an ambiguous document must be construed against the drafter of the document, the court is not bound to accept the interpretation offered by the nondrafting party." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 100 n 4; 508 NW2d 150 (1993).

Contrary to defendant's assertions, the evidence favoring defendant was not uncontroverted. As the trial court noted, there was evidence supporting both parties' positions. In addition to Kole-James' testimony that the parties agreed to a minimum guaranteed monthly assignment of 2,500 members, it is undisputed that for three months, February through April 1998, defendant paid plaintiff for 2,500 members even though the current membership for those months were 2,125, 2,101, and 1979, respectively. Similarly, defendant's May 1998 monthly capitation report shows payment to plaintiffs for 2,500 members although the current membership was 1,983. The documentary evidence of defendant's payments for each of these months expressly states that plaintiffs were being paid for 2,500 members "per your contract." Plaintiffs also presented evidence of the parties' course of dealings during negotiations to support their claim, including a written proposal from defendant's chief operating officer that offered a guarantee of 2,000 PlusCare members.

Also contrary to defendant's assertion, it was not uncontroverted that plaintiffs never complained of monies due under the PlusCare Agreement despite their many other written complaints. Kole-James' testified that he made repeated complaints to defendant about the PlusCare underpayments. He also stated in a July 1998 letter that the Plus Care Agreement needed to be addressed and resolved.

The standard for deciding a motion for directed verdict or JNOV requires that the evidence be viewed in a light most favorable to the nonmoving party, granting that party every reasonable inference. Defendant's argument ignores this standard and instead discounts all evidence supporting plaintiffs' position. Viewing the evidence in a light most favorable to plaintiffs and granting them every reasonable inference, reasonable minds could differ on the meaning of the payment provisions of the PlusCare Agreement and whether the parties contracted for a minimum or guaranteed assignment of 2,500 members per month. The trial court therefore properly denied defendant's motion for directed verdict.

Under the same reasoning, the trial court properly denied defendant's motion for JNOV. Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Craig v Oakwood Hosp*, 249 Mich App 534, 547; 643 NW2d 580 (2002) (Cooper, J, concurring). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id*. If the evidence is such that reasonable minds could differ, the question is for the jury, and JNOV is improper. *Id.*

III

Defendant raises three additional claims on appeal. We likewise find no basis for relief with respect to these claims.

A

We find no basis for disturbing the jury verdict with regard to defendant's counterclaims. The jury found that defendant failed to prove its Medicaid counterclaim. The resolution of this issue was a matter of witness credibility, properly resolved by the jury. Defendant's evidence of

a Medicaid overpayment was not conclusive. The claim was based on a summary prepared for trial and defendant's current chief financial officer's testimony, whose credibility with regard to his knowledge of the overpayments was attacked on cross-examination. The factual record was not "so clear that reasonable minds should not have disagreed." Defendant was not entitled to entry of judgment in its favor in the amount of $20,089.26.

Similarly, reasonable minds could differ regarding whether defendant was obligated to a minimum monthly payment of $37,500, and therefore the jury could reasonably conclude that defendant was not entitled to recover for the claimed PlusCare overpayments in February, March and April 1998. Defendant's argument fails based on the analysis in part II above.

B

Defendant claims that the same factors that warranted a new trial after the first trial justified the grant of a new trial after the second trial because the records were substantially identical. We disagree.

The same judge presided over both trials. The trial court provided three specific bases for denying defendant's motion, with respect to differences between the first and second trials. Defendant has not shown that the court erred in its reasoning.

Because defendant presents only cursory argument and fails to argue the merits of this position, this issue is not properly presented for review. It is therefore deemed abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Even considering the merits, we find no abuse of discretion. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Although the factors cited by the court in granting defendant's earlier motion for new trial were also applicable to the second trial, the key difference is in the weight of the factors when balanced against the evidence favoring plaintiffs. With regard to the second trial, the court concluded that the result was not against the great weight of the evidence. The substantive differences in the proofs at the second trial, cited by the trial court, support the court's conclusion.

C

Defendant's cursory argument that the contract payment provision is unambiguous, and therefore the trial court should have granted defendant's motion for summary disposition, is without merit. This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Spiek, supra.* Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

As noted in part I, the contract payment provision is ambiguous, and the trial court therefore properly denied defendant's motion for summary disposition. The parties' intent was a question of fact and a matter for the jury to decide.[5]

Docket No. 246370

Defendant appeals the trial court's entry of judgment awarding plaintiffs actual costs pursuant to MCR 2.403(O). On August 14, 2002, plaintiffs filed a motion for taxable costs of $536 and reasonable attorney fees of $235,444.05 for the period November 1, 2000 through July 31, 2002. Plaintiffs did not produce the attorney fee invoices at that time, but stated in the motion that the invoices would be produced for an *in camera* review by the court or as otherwise directed by the court. After defendant filed its response and objections to plaintiffs' motion, on August 22, 2002, plaintiffs produced the invoices, designating them "confidential," under a previously entered protective order in this case. Following an evidentiary hearing on December 13, 2002, the trial court awarded plaintiffs $159,905.35. The court reasoned that awarding actual costs of one-third of the judgment was an appropriate calculation of reasonable attorney fees, based on the relevant factors, which took into account defendant's objections with regard to the necessity of the fees and the result achieved.

IV

Reversal of the award of attorney fees is not required on the ground that plaintiffs' motion for case evaluation sanctions did not include the invoices to support their attorney fee request. Where applicable, the imposition of case evaluation sanctions is mandatory, and a court's decision whether to grant sanctions is a question of law subject to de novo review on appeal. *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887, lv den 469 Mich 964 (2003); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997).

Defendant argues that plaintiffs waived their right to pursue case evaluation sanctions with respect to attorney fees because plaintiffs' request was not perfected within the period permitted by MCR 2.403(O). A request for sanctions must be filed and served within twenty-eight days after the entry of judgment or of an order denying a motion for a new trial or to set aside the judgment. MCR 2.403(O)(8), *Brown v Gainey Transportation Services, Inc*, 256 Mich App 380, 382; 663 NW2d 519 (2003). Defendant contends that although plaintiffs' motion for actual costs was timely filed, plaintiffs submitted no detail for the attorney fees (in the form of invoices or otherwise) until three days after the August 19, 2002 deadline set forth by MCR 2.403(O)(8).

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[5] Defendant's claim is also rejected on procedural grounds. We find no transcript of the February 22, 2002 hearing on the motion for summary disposition in the record, and it appears that the transcript was not requested for this appeal. This Court will refuse to consider issues for which the appellant failed to produce the transcript. *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991).

Defendant's argument is unsupported by any appropriate authority. Defendant quotes Dean & Longhofer, Michigan Court Rules Practice, "[I]t is essential that counsel keep accurate time records **and that these records be the basis for any motion requesting attorney fees under [MCR 2.403(O)(8)]**," as authority for its argument that plaintiffs were required to file their complete request, including attorney fee invoices, within the required twenty-eight-day period. However, plaintiffs' motion does not run afoul of the stated prerequisites for filing a fee request. There is no argument that plaintiffs failed to keep accurate time records or that their records were not the *basis* of their request. The invoices on which plaintiffs' request was based, were made available to defendant well in advance of the hearing on plaintiffs' motion. Plaintiffs' request for fees can hardly be considered to be "bifurcated" as defendant contends.

V

Defendant's argues that plaintiffs were not entitled to fees associated with the first trial and various post-trial motions because they were not "necessitated" by defendant's rejection of the case evaluation. We disagree.

MCR 2.403(O)(6) provides in relevant part:

> (6) For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services *necessitated by the rejection* of the case evaluation.

The phrase "necessitated by rejection" is intended to permit recovery of only those fees incurred after the rejection. *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc,* 194 Mich App 230, 235; 486 NW2d 68 (1992).

Defendant argues that because the second jury trial was necessitated more by a failure of plaintiffs' proofs than by defendant's rejection of the case evaluation, plaintiffs were not entitled to fees associated with the first trial. MCR 2.403(O)(6)(b). However, as plaintiffs argue, the phrase "necessitated by the rejection" does not necessarily preclude an award of fees for work in both trials, as well as post-trial motions. The phrase denotes only a temporal demarcation, precluding recovery of fees for hours spent before rejection of the case evaluation. *Severn v Sperry*, 212 Mich App 406, 417; 538 NW2d 50 (1995). Whether sanctions should be awarded depends on the outcome of the case, including the result of any appeal. *Id*. Further, MCR 2.403 does not limit the award of attorney fees to only fees for services performed at the trial itself. *Troyanowski v Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988).

The award of costs was not improper under the circumstances of this case. The trial court took into consideration the relevant factors for awarding reasonable attorney fees and reduced the amount requested to an award that it determined reflected a reasonable fee for the result achieved. The court factored into its consideration defendant's concerns regarding the two trials and the outcomes on particular claims. "The cost of two trials was part of the risk assumed by defendant when it rejected the mediation evaluation." *Severn, supra* at 417.

VI

Finally, defendant argues that the award of fees was error because 1) the invoices were not admitted into evidence until after the court's ruling, 2) the court did not consider all six of the required factors in awarding attorney fees, and 3) the award was improperly based on a contingent fee. We disagree.

With regard to the admission of the invoices, as plaintiffs note, the hearing was not concluded when defense counsel noted that the invoices were not admitted into evidence. The court, sua sponte, reopened the proofs and admitted the invoices as evidence. Defendant complained that the admission of the evidence was too late because the court had already ruled. Defendant's argument is without merit. Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. *Hilgendorf v St. John Hosp and Medical Ctr Corp,* 245 Mich App 670, 693; 630 NW2d 356 (2001); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

Defendant claims that the court erred in failing to consider all six of the required factors in awarding attorney fees. The relevant factors to be considered in determining the reasonableness of attorney fees are: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 181; 568 NW2d 365 (1997), citing *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). While a trial court should consider these factors, it is not limited to these factors in making its determination. *Id.* A trial court need not detail its findings as to each specific factor considered. *Id*.

The trial court conducted an extensive evidentiary hearing with regard to attorney fees. Testimony from plaintiffs' trial attorney addressed various relevant factors. In rendering its decision, the court acknowledged the factors, stating that all involved knew what the factors were, and results achieved was one of them. *Joerger, supra* at 181. The trial court considered relevant factors and accounted for defendant's objections to the fee request in making the award. Defendant's clam of error is without merit.

The award of costs was not improperly based on a contingent fee. The trial court considered its calculation of permissible fees (based on one-third of the requested fees) an approximation of the reasonable fees for services rendered. The court noted that the fees requested were approximately forty-nine percent of the verdict amount, which was unreasonable. The court indicated that it would not spend another week going through the invoices, hour by hour, bill by bill, a decision with which defense counsel agreed. As noted above, the court's express mention of the factors to be considered in awarding attorney fees was somewhat cursory. However, the court acknowledged the factors. In deciding on an award of one-third of the verdict amount, the court noted that it was factoring in defendant's objections and that plaintiffs' counsel was not receiving the hourly rate requested. We find no error of law requiring reversal.

VII

Given our disposition, we do not address the claims presented in plaintiffs' cross-appeal.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Janet T. Neff